IN THE

Supreme Court of the United States

In Bankruptcy, No. 16461.

In the Matter
of
RALPH A. STILWELL, Bankrupt.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONING CREDITORS-RESPONDENTS.

Edwin J. Culligan
FALK, PHILLIPS, TWELVETREES & FALK,
Attorneys for Appellees,
Office & P. O. Address,
1918 Liberty Bank Building,
Buffalo, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

CASES CITED.

IN THE

Supreme Court of the United States

In the Matter of RALPH A. STILWELL, Bankrupt.	In Bankruptcy No. 16461.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONING CREDITORS-RESPONDENTS.

Facts.

On November 10, 1930, Ralph A. Stilwell was adjudicated a voluntary bankrupt in the United States District Court for the Western District of New York. The proceedings on bankrupt's petition were referred to Hon. Joseph C. White, now deceased, Referee in Bankruptcy of the Chautauqua and Cattaraugus Districts. Bankrupt's petition for discharge was filed with the Clerk of the District Court at Buffalo on March 23, 1931, and on the same day an order to show cause, returnable May 18, 1931, was issued by the District Judge on this petition for discharge. This order

provided that notice thereof be published in the Jamestown Evening Journal at least thirty days before the return day, and that the Referee should send or cause to be sent a copy thereof by mail to all creditors at least thirty days before the return day.

On March 24, 1931, Mr. White, the Referee, sent a letter to the bankrupt's attorney, Mr. Young, advising him of the amount of fees required, and advising him that upon receipt thereof, the notices of discharge would be published and mailed. (P. 14.)

This letter was ignored; and on July 10, 1931, Mr. White signed an order reciting that the demand for disbursements had been sent to the bankrupt's attorney and had been ignored, and directing the bankrupt and his attorney to show cause on July 17, 1931, why he should not return the order to show cause on discharge to the Clerk of the District Court for the Western District of New York because of non-prosecution. (P. 15.) This order to show cause was duly served on the bankrupt and his attorney. (P. 16.)

On July 27, 1931, the return day of the order to show cause, Mr. White made an order reciting that notice to pay the fees had been given to Mr. Young, that the order to show cause had been served on Mr. Young and the bankrupt did not file an affidavit stating that he was without, and could not obtain, money to pay for the proceeding, and ordered that the order to show cause on discharge of the bankrupt be returned to the Clerk of the United States District Court for the Western District of New York, with the recommendation that the matter be withheld until the necessary disbursements were paid. (P. 17.)

In 1933 the bankrupt made his appearance in Zanesville, Ohio, as Earl J. Jones, and lives there now under that name. He has acquired wealth, owns and publishes a newspaper, operates a coal mine, owns a coal company, transportation company, automobile sales and service agency and other enterprises, and apparently as a pastime "fights" with lawyers. (P. 52.) The bankrupt testified (P. 51) that he was in Ripley until November, 1933, when he went to Zanesville, Ohio and immediately took the name of Earl J. Jones. In 1940 it was discovered that Earl J. Jones was really the bankrupt, Ralph A. Stilwell, and his creditors brought actions to recover on their undischarged claims. (P. 51.) Then and not until then did he do anything about a discharge; and this is what he did. He paid the fees to the Hon. Arthur B. Towne, who upon Mr. White's death was appointed Referee in Bankruptcy, and, upon receipt of the money, Mr. Towne wrote the Clerk of the District Court on July 12, 1940 that he had received the fees. The letter continued as follows:

> "I understand that the discharge in the above matter was held up pending payment of this sum. The discharge may now be entered, if satisfactory to your office." (P. 18.)

The Clerk thereupon entered a discharge on July 13, 1940 (P. 19), although no notice of the bankrupt's application for discharge had ever been given any creditor. In August, 1940, on the application of several creditors of the Bankrupt, based on the foregoing facts, Judge John Knight made an order directing the bankrupt to show cause why the discharge should not be vacated and why a further order should not be made dismissing the bankrupt's proceedings for a discharge. The bankrupt appeared by his attorney, Harry M. Young, the same attorney who represented him in the bankruptcy and discharge proceedings, and filed

answering affidavits made by Mr. Young and himself. (Pp. 24, 25, 26, 27 and 28.) Both affidavits were barren of any substantial explanation for the delay of ten years in prosecuting the application for a discharge, but each affiant swore that he believed that the discharge had been granted. Neither the bankrupt nor his attorney denied receipt of the letter (P. 14) and order to show cause. (P. 15.) Neither the bankrupt nor his attorney stated the basis for his belief that the discharge had been granted. Neither attempted to justify his alleged belief in the fact of the actual advice to each of them, receipt of which was not denied, that the discharge had not been granted. Mr. Young did not state whether he made any attempt to locate his former associate; instead both men chose to stand on their bare, unexplained statements that they thought that the discharge had been granted.

On August 27, 1940, an order was granted vacating and setting aside the discharge and dismissing the proceedings for discharge. Bankrupt appealed to this court from the order and this court held that the discharge was properly set aside, on the ground that the notice to creditors, required by statute, was jurisdictional, and failure to give such notice was fatal, but reversed that part of the order which dismissed the proceedings, and remanded the case back to the District Court with directions to receive evidence either of prejudice to the creditors or of a deliberate determination by bankrupt to forsake the proceedings. (Pp. 8, 9 and 10.) Thereupon notice to creditors was published and mailed. Objections to the discharge were filed, specifying, among other things, abandonment by the bankrupt of his application for discharge. (Pp. 31 and 32.) The depositions of Robert T. Norment, one of the objecting creditors, Mr. Joseph A. Lazaroni, Mr. Young's former associate and the bankrupt were taken, and submitted to the court, and the

court sustained the objection that bankrupt had abandoned his application for discharge.

On September 25, 1942, an order was entered denying the application for discharge on the ground of abandonment by the bankrupt, together with $100.00 costs and disbursements. From this order the bankrupt again appealed to the United States Circuit Court of Appeals for the Second Circuit. The Circuit Court affirmed the order and said, among other things:

> "The facts would not only justify but even require a finding that the bankrupt abandoned his application for a discharge."

From this order of affirmance the bankrupt appeals.

Question Presented.

Did the bankrupt abandon his application?

LAW.

POINT I.

An application for a discharge in bankruptcy, like any other application or any other proceeding, can be abandoned by the applicant.

All Courts, including the United States Supreme Court, have recognized that any proceeding or any right can be abandoned. It was said by the United States Supreme Court, in *Moran v. Horsky*, 178 U. S. 205:

> "We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce."

On this theory, the Circuit and District Courts of the United States have consistently held that a bankrupt guilty of wilful or intentional neglect or abandonment of an application for a discharge will not have his discharge.

See

Lindeke v. Converse, 198 Fed. 618, C. C. A. 8th Cir. 1912.

In re Lederer, (D. C.) 125 Fed. 96.

In re Reisler, 275 Fed. 65 (reversed on other grounds 278 Fed. 618).

The bankrupt in the case at bar failed to perfect his application for discharge at the time he made it by not paying the fees which he was under an obligation to pay. It is no injustice to the bankrupt to deny him a discharge on this ground, because of the fact that he could have proceeded as a pauper if it was impossible for him to pay the fees, and he also failed for a period of ten years to prosecute his application for a discharge. The finding of the court that he abandoned his proceeding by this conduct is certainly sustained by the record. To deny him his discharge because he made no effort to get it, it is submitted, does not amend the Bankruptcy Act so as to include another ground on which to deny the bankrupt's discharge, but does nothing more than recognize what the courts have always recognized, to wit: the possibility that a man can abandon a proceeding or a right.

The bankrupt, in his brief, states that he is being penalized as heavily as if he had committed one of the crimes or frauds mentioned in the Act. In this connection, may we point out that the Circuit Court has said about the bankrupt:

> "One has but to read the bankrupt's deposition to see how ready he was to give any answer which would serve his purpose and how unreliable was his testimony."

If the bankrupt had not filed his application for a discharge within the time provided by the Bankruptcy Act, he could not have obtained a discharge, no matter how virtuous he had been. In this case, the bankrupt went through the formality of filing an application within the time provided by the Bankruptcy Act, but his subsequent conduct indicated that this technical compliance was a sham; that there was no substance to it; that he did not really intend to pursue his application for discharge, even if he were entitled to one; and that he abandoned the whole proceeding. While the record indicates that the bankrupt is not a man of shining virtues, this point is not pressed, but it is respectfully submitted that the record amply sustains the finding that the bankrupt did abandon the whole proceeding for a discharge, and having so abandoned it, was not entitled to obtain a discharge any more than if he had not made the technical compliance that he did.

Under the circumstances, it is respectfully submitted that the bankrupt lost, by his own neglect, regardless of any rights he may have had, the right to obtain a discharge, and put himself in the same position as if he had never filed an application therefor.

POINT II.

Bankrupt's petition for a writ of certiorari should be denied.

Respectfully submitted,

FALK, PHILLIPS, TWELVETREES & FALK,
Attorneys for Appellees,
Office and P. O. Address,
1918 Liberty Bank Building,
Buffalo, New York.